

Andrew N. Nathanson
617 348 4979
annathanson@mintz.com



One Financial Center
Boston, MA 02111
617 542 6000
mintz.com

April 1, 2019

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Carl Dierker
Regional Counsel
EPA Region 1
5 Post Office Square
Suite 100
Boston, MA 02109

Re: *Conservation Law Foundation v. Longwood Venues & Destinations et al.*, United States District Court for the District of Massachusetts, No. 1:18-cv-11821-WGY

Dear Mr. Dierker:

As you know, Mintz represents the defendants in the above-referenced matter. Enclosed please find a subpoena issued pursuant to Federal Rules of Civil Procedure 30 and 45. I write pursuant to EPA's housekeeping rules, 40 C.F.R. § 2.401 et seq., to "state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA." 40 C.F.R. § 2.403.

The Conservation Law Foundation ("CLF" or "Plaintiff") alleges that one or more of the defendants "own and/or operate" a waste water treatment facility in Harwich Port, Massachusetts. According to CLF, the federal Clean Water Act ("CWA") requires one or more of the defendants to have a NPDES permit because its waste water treatment facility is a "point source" that is adding "pollutants" to a Water of the United States by way of a hydrological connection from the wastewater treatment facility to groundwater. The Massachusetts Department of Environmental Protection has previously determined, and we believe EPA has previously agreed, that the waste water treatment facility is not a point source regulated under the CWA. The testimony and documents we seek from EPA relate to three subjects: (1) applications for NPDES permits for septic systems or other systems that discharge effluent to the ground or groundwater in the Commonwealth of Massachusetts; (2) EPA's evaluation of any such applications; and (3) EPA's position regarding whether any such systems require such a NPDES permit including any EPA conclusions that any such systems are, or are not, point sources covered by the CWA.

It would be in EPA's interest to provide the requested discovery because CLF's hydrogeological connection theory is one on which the federal Courts of Appeals are currently split, and as to which the United States Supreme Court has now granted certiorari. *See Cty. of*

BOSTON LONDON LOS ANGELES NEW YORK SAN DIEGO SAN FRANCISCO WASHINGTON

MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.

Maui v. Haw. Wildlife Fund, Case No. 15-17447 (petition for certiorari granted Feb. 19, 2019, limited to the question “[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater”).

EPA has also indicated an intention to resolve this same issue by rulemaking on February 20, 2018 requesting comment on “whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdiction surface water may be subject to CWA regulation.” 83 Fed. Reg. 7126, 7126.

Given EPA’s prior pronouncements on this issue, it is critically important that the Court have the benefit of the testimony and documents requested in connection with its disposition of this case.

Please do not hesitate to call with any questions.

Sincerely,


Andrew Nathanson

Enclosures

cc: Principal Deputy General Counsel David Fotouhi (*by email only*)
Deputy Regional Counsel Timothy Williamson (*by email only*)
Attorney Samir Bukhari (*by email only*)
Heather A. Govern (*by email only*)
Jeffrey R. Porter (*by email only*)
Emily Kanstroom Musgrave (*by email only*)

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

CONSERVATION LAW FOUNDATION

Plaintiff

v.

LONGWOOD VENUES & DESTINATIONS, INC., ET

AL.

Defendant

Civil Action No. 1:18-cv-11821-WGY

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Person(s) Most Knowledgeable under FRCP 30(b)(6), EPA Region 1, 5 Post Office Square, Suite 100
Boston, MA 02109

(Name of person to whom this subpoena is directed)

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

See Schedule A, attached hereto

| | | |
|--------|---|--------------------------------------|
| Place: | Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. One Financial Center Boston, MA 02111 | Date and Time: 04/22/2019 9:00 am |
|--------|---|--------------------------------------|

The deposition will be recorded by this method: _____

☒ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

See Schedule A, attached hereto

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/01/2019

CLERK OF COURT

OR

/s/ Andrew Nathanson

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Longwood Venues & Destinations, et al.

, who issues or requests this subpoena, are:
Andrew Nathanson, Mintz, One Financial Center, Boston, MA 02111

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:18-cv-11821-WGY

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

SCHEDULE A

I. DEFINITIONS

The following definitions shall apply to all items contained within this Schedule A:

- A. The term “document” or “documents” is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a) and includes, without limitation all writings of any kind (including the originals, drafts and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise), including without limitation, correspondence (including electronic mail), notes, statements, forms, applications, and records.
- B. The term “concerning” shall be construed in the broadest sense of the term, and shall mean relating to (directly or indirectly), referring to, describing, evidencing, referencing, demonstrating, mentioning, constituting, containing, indicating, summarizing, describing, regarding, supporting, contradicting, reflecting, or addressing in any way the subject matter of the subpoena duces tecum.
- C. The term “communications,” shall mean any written or oral transmittal of fact information or opinion, including any utterances, notations, or statements of any nature, including but not limited to written correspondence or other documents, electronic mail, facsimiles, oral conversations or discussions (whether in person or by telephone, and whether conducted directly or through an intermediary), transmittals of information by or between computer equipment or devices, and records, notes or minutes of, or concerning, any oral communications or meetings.

II. DOCUMENTS REQUESTED

- A. All documents or communications concerning applications for NPDES permits for septic systems or other systems that discharge effluent to the ground or groundwater in the Commonwealth of Massachusetts, from January 1, 2009 to the present.
- B. All documents or communications concerning the evaluation, approval, or denial of any NPDES permit applications meeting the description in Item A.
- C. All documents or communications concerning the classification, as a point source or non-point source within the meaning of the Clean Water Act, of the waste water treatment facility located at the Wychmere Beach Club, 23 Snow Inn Road, Harwich Port, Massachusetts.